[G-12] SUBMISSION

to the

Minister of Consumer and Corporate Affairs

re

BILL C-256

COMPETITION ACT;

[by] Consumers' Association of Canada]

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A. INTRODUCTION

1. The Consumers' Association of Canada, an organization of 60,000 members, welcomes the proposed Competition Act, introduced last June in the House of Commons by the Minister of Consumer and Corporate Affairs, as a first step towards greater protection for the economic interests of the Canadian public.

2. We express our alarm at the view, apparently widespread and largely promulgated through the media by business interests, that the proposed Bill represents the imminent demise of the free market economy in Canada. We cannot believe that such a view is soundly based; nor can we believe that, among sophisticated businessmen, it is seriously held. The Bill does deal with matters of central significance to Canadian consumers and is likely to be of much benefit to them. However, the total impact of the Bill is on the Canadian market economy. By its efforts to preserve and improve the structure of the market mechanism in Canada, it is intended to improve the functioning of the economy. Issues which require intensive economic analysis will be determined on the basis of true benefit rather than on precedents established under criminal law. In this way, the economy will benefit and the consumer interest be served.

3. The concern of the Consumers' Association of Canada is, of course, how the Bill will affect consumers in its stated intention to increase competition and market efficiency.

Public policy can attempt to accomplish this through three general methods:

1) by encouraging and creating an effective competitive environment;

2) by ensuring that consumers are provided with information on available goods and services, thereby enabling them to make satisfactory purchase decisions;

3) by supplementing the market by furnishing direct and specific protection to consumers against such dangers as hazardous products and fraudulent and misleading practices of various kinds.[1]

4. Bill C256 promises to bring important advances on each of these fronts. It strengthens and clarifies competition policy generally, and it is likely to make such policy effective for the first time in areas such as corporate takeovers, price discrimination and "tied sales" where the present Combines Investigation Act and its administration have failed to promote effective competition. At the same time, the Bill provides forceful regulation, as it should, of misleading advertising and other kinds of deceptive sales promotion for which consumers now "pay the shot".

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[1] This need for thorough and reliable consumer information and protection is the justification for such legislation as that affecting packaging, labelling and weights and measures.

5. CAC is keenly aware that strong pressures are being exerted by segments of the business community to defeat this Bill. Business is naturally wary of any change which appears to lead toward greater regulation of their activities even though the change is aimed at improving the competitive environment. Indeed, much of the difference in this issue is semantic but consumers cannot accept a definition of competition which implies unencumbered exercise of existing or developing market power. In addition some over-monopolized, uncompetitive industries have a substantial vested interest in preserving their existing economic environment and will be prepared to divert large sums of financial resources toward defeating the proposed legislation.[2] In spite of strong lobbies against Bill C-256, the act must be judged according to its contribution to the well-being of all Canadians, and it must recognize the legitimate interests of consumers.

6. Our preliminary research confirms that virtually every Canadian would benefit as a consumer from freer markets and that the vast majority of Canadian businessmen

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2 It can be estimated that monopolistic arrangements in the "ethical" drug industry were responsible for extra profits of 10 million dollars. Compared to the United Kingdom, which has a pro-competition policy somewhat similar to that proposed for Canada, a sampling of drug prices in both countries showed that Canadians were charged 45% more, on average, for the same products. This average was derived from figures of the Pharmaceutical Manufacturers Association. The alternative interpretation for the same figures indicates that Canadians paid 84% more. See Appendix 1, Tables 11 and 111.

would benefit as well. For example, 32,000[3] businessmen in the gasoline retailing industry are adversely affected by market-tieing practices that are illegal in other countries[4]; 276,835 farmers purchase farm equipment at oligopolistic prices[5]; 17,000 doctors must work with the non-competitive drug industry. These conditions are reflected in the form of higher prices. Furthermore, the existence of these monopoly elements in the economy tends to worsen the serious "trade-off" problem faced by Canadian policy-makers when they try to achieve both full employment and stability in the general level of prices. These are compelling reasons for increasing competitive business behaviour in Canada which have national and public interest in addition to consumer interest implications.

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3 Preliminary statistic

4 See Gasoline Marketing in the Context of the Oil Industry (Government of Alberta, December 1968).

5 The number is for "commercial farms" from the 1966 census (in 1961 there were 259,037 commercial farms). The number of "census farms" for 1966 is higher: 430,522. On pricing practices, see the Barber Report on the Agricultural Implement Industry.

B. THE REGULATORY AGENCY

7. CAC accepts in principle and approves of the two-pronged approach to competition policy as provided for by the Bill. There are practices which are clearly not acceptable in any conceivable instance. These should be punishable under criminal law provided the precise character of the offence is clearly spelled out by the legislation. CAC approves the provision of an avenue whereby individuals injured by these practices can sue for double damages.

8. A comprehensive and functional competition policy cannot consist exclusively of outright prohibitions however, and in this regard the proposed introduction of civil law and creation of the Competitive Practices Tribunal seems a useful, and indeed necessary, innovation. CAC recognizes that the Federal government should not place an unqualified ban on such practices as corporate takeovers, certain forms of price discrimination and various exclusive dealings and franchise arrangements. There are demonstrable cases where such practices have resulted in considerable benefits to Canadian consumers. In other cases, however there have been harmful results as, for example, where a takeover has given the enlarged company a virtual monopoly in part of the Canadian market, or where an exclusive dealing arrangement has prevented a corner service station from buying its tires and batteries from the lowest cost supplier. The problem is to find a way of dealing effectively with these harmful cases and also with

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those still more difficult cases where there is a mixture of good and harmful effects.

9. There appears no workable alternative to assigning such matters to a body expert in assessing their effects. The distinction between acceptable and unacceptable effects and the problem of weighing one against the other can be better resolved by economic evaluation conditioned by legislative objectives than by established legal precedent.

10. Whatever the reason for the lack of success with present pro-competition policy in this country, experience indicates a need for something that will essentially be a court in many important ways - notably in respect for fairness, justice and the liberty of the subject - but that will also have the extra element of flexibility required to deal with the complex economic matters coming before it. Many other countries have found specialized tribunals to be necessary in the administration of their competition policies. It is unfortunate that the novelty of the Tribunal has been exaggerated. In Britain, for example, there are the Monopolies Commission and the Restrictive Practices Court, and in the United States, the Federal Trade Commission.

11. Businessmen have expressed an understandable concern that the Tribunal might abuse its mandate from Parliament and exercise sweeping, arbitrary powers over Canadian economic life. The setting up of any administrative

tribunal or quasi-court always involves some risk of this kind. CAC is concerned however, that the proposed structure and procedures of the Tribunal will incorporate it unneccesarily from general public access. We believe that this Tribunal is constituted in a manner which makes it unduly vulnerable to the influence of the business community, to the virtual exclusion of consumer influence.

12. We reaffirm our view that, while any measures in the area of economic regulation must be taken with an awareness of their effects on all parties, it is the interests of the consumer, the average citizen, which must be paramount. Our justification for this view is that it is we who pay the bills in our economy.

13. Regulatory agencies normally have difficulty in efficiently performing their tasks. Though some may dispute the reasons, there is consensus that regulatory agencies tend to begin with considerable fervour, and to continue with progressively less. It is not difficult to find examples of well-established agencies whose decisions are repeatedly criticized for favouritism towards those who were to be regulated, at the expense of citizens on whose behalf the regulation was initially undertaken.

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14. Without going into the matter in detail at this time, a brief list of the causes of this phenomenon follows:

i) inexplicit mandate

A tribunal may have no specific statutory mandate, resulting in an uncertainty regarding policy.

ii) dependence for funds

Although agencies are not frequently subjected to overt political pressure, they are ultimately dependent for their necessary finances. A reluctance to offend the funding authority may set in.

iii) low visibility

It is undoubtedly true that most members of Parliament, let alone the general public, could name the chairmen of few of the existing agencies. While this low visibility may be seen as an insultation from pressure, it is also a protection against accountability.

iv) Interested parties dominate proceedings before tribunals, the more dispersed public interest being less capable of organizing itself. Like the agency itself, the public has difficulty in matching the resources industry can bring to bear in litigation before the tribunal. Thus, most of the information brought to the tribunal, and most of the perspectives communicated come from the regulated. The daily person-to-person contacts of those on the agency are likely to be with

individuals in the regulated industry. In such circumstances, it is not difficult to understand how the perspective of the industry can be adopted by the tribunal.

v) the appointments problem

Often those possessing expertise in the regulated area are those whose work experience and training has been in the regulated industry. Thus people move back and forth from industry to agency with the result that, over time, the same individuals both regulate and are regulated.

vi) the disturbance problem

Any organization is sensitive to turmoil. The inclination is to act in such a way as to avoid opposition and the accompanying upheaval; appeals to the courts, review by parliamentary committees, etc. Since the group with sufficient resources to create disturbance is normally the group which is regulated, the common method is to avoid antagonizing the regulated industry. This can be done by making certain that the agency, protects its interest.

C. THE COMPETITIVE PRACTICES TRIBUNAL

15. The Consumers' Association of Canada contends that the best way of minimizing these inherent difficulties is to maximize the possibility of public participation in the Tribunal through the structure and procedures used.

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In our opinion, Bill C-256 would severely limit the possibilities for representations in the public interest. While we will ennumerate some of the deficiencies we perceive, we wish to note that the proposed structure and proceedings represent a regretable departure from the principles of citizen participation avowed by this government.

16. Any tribunal must permit actions to be commenced either by its own motion, or by those whom it regulates. But it is not uncommon among Canadian regulatory agencies to permit a more general interest, in this case the consumer interest, full access to the fact gathering and deliberative processes of the agency. This Bill, somewhat incongruously considering its general purpose, would grant a monopoly of this function to the Commissioner. CAC understands that procedures must be capable of excluding inconsequential and vexatious actions. And it is useful to have someone responsible on a full-time basis for representing the public interest before the Tribunal, i.e. the Commissioner. The Bill, however, would do more than that. It could completely insulate the Tribunal from direct public access.

17. 1) The Bill makes no provision for consultation with consumers groups in the process of selecting the members of the Tribunal or the Commissioner. More importantly, no provision for explicit recognition of the consumer interest is made in the constitution of the Tribunal.

18. In order that the Tribunal truly reflect the public interest, we recommend that appointments be made of individuals who have evidenced an understanding of the consumer interest, and that at least three of the seven seats be reserved for individuals who will directly represent consumers. This would mean that advocacy of the consumer interest is institutionalized within the Tribunal itself.

19. 2) The basic regulatory framework of the Bill does not afford members of the public direct access to the proceedings of the Tribunal; indeed, access is for the most part explicitly restricted to the Commissioner and to those with some business interest or personal pecuniary interest. This is true at the stage at which findings are made, injunctions are granted, and orders are finalized. The only exception to this general rule is in the case of the procedures relating to proposed consent orders.

20. The only route to the Tribunal for interested parties from the general public is through the device of a petition of six persons to the Commissioner, who is then under no statutory duty to initiate proceedings on their behalf, no matter how meritorious their claims may be. Most importantly, even if the Commissioner proceeds with an action, since these individuals are never to become parties before the Tribunal, they will not be compensated for research or other costs they may have incurred in bringing the matter

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to the Commissioner's attention. This seems incongruous in light of recent amendments to the Canada Corporations Act which make provision for the payment of costs to minority shareholders who successfully bring action against the company.

21. It is submitted that, where any application is made to the Tribunal, that body will be capable of striking it out if it is merely vexatious. The Commissioner serves a valuable function as a full-time advocate of the public interest. When, however, his role includes a pre-screening of all matters which individuals and groups would desire to place before the Tribunal, he becomes not the advocate of the public interest but the judge of the public interest. This will serve to insulate the Tribunal from public pressure, and, in the long run, diminish its vigour as a regulatory body.

22. We recommend that any interested party, with or without a business or other pecuniary interest, have full standing before the Tribunal, subject only to a right of the Tribunal to strike out vexatious actions.

23. 3) The Bill permits the insulation of the Tribunal through the device of the secret hearing, subject to exceptions in the public interest. We note that the confidential information of business interests is not protected in this fashion in ordinary civil or criminal proceedings. It is submitted that if

there are legitimate exceptions to a general rule in favour of public hearings, these must be spelled out in the stature. It is a general rule in our law that, once investigative proceedings give way to hearings, the public has the right to scrutinize the activities of its judicial and quasi-judicial officers.

24. We recommend that, with whatever exceptions may be explicitly spelled out in the statute, all proceedings before the Tribunal be held in public.

25. Our concern, then, is that the Tribunal be given an opportunity to perform its functions in the most vigorous manner possible. It is our view that interested members of the public have a legitimate claim to a role in policy-making in this area. This entails access to the fact-finding and all deliberative proceedings of the Tribunal, as well as to the process of selecting its members. The Commissioner's role as a pre-screening device could effectively defeat that interest.

26. We are strongly of the opinion that the insulation of the Tribunal from direct public access is neither necessary nor proper. We trust that a government which has seen fit repeatedly to avow the policy of citizen participation in the processes of government will not now retreat from that principle.

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D. SPECIFIC PROVISIONS OF THE ACT

27. Several other features of the act deserve mention here. The extension of competition policy to service industries is long overdue. Ours is increasingly a service economy, and a substantial proportion of consumer complaints received by CAC and Box 99 of the Department of Consumer and Corporate Affairs have to do with service industries. Moreover, once a consumer has bought a service be it carpet cleaning, accident insurance or a medical operation, he cannot take it back to the store if it proves unsatisfactory, as he could in the case of a defective physical article. It is even more important therefore, that vigorous competition be promoted in the service fields. However, all sections referring to misleading advertising must include services as well as goods, which alone are covered at present. As the Economic Council of Canada has noted, among the twenty-two member countries of OECD, only Canada and Ireland fail to include services in their competition acts.

28. The Bill's provisions regarding resale price maintenance and refusal to sell are especially welcome to consumers. They will tend to permit the entry into business of discounters and other distributors operating on a high volume, low mark-up basis. CAC approves the clarification of the resale price maintenance offence, the tighter provisions regarding "suggested resale prices" and the removal of the defences against the charge of resale price maintenance

placed in the Combines Act in 1960. It has been argued that some of these defences were actually a form of consumer protection, but this is not our view. Their only significant impact was to weaken the prohibition of resale price maintenance.

29. CAC also notes with approval the insertion into the bill of special provisions to deal with undesirable practices in professional and organized amateur sports. The law must allow professional sports leagues the scope they need to mount exciting and closely matched games. But it does not, in our judgement, require that inexperienced young people be required to sign their entire playing lives to some particular team or league.

30. The importance of including the public sector under the provisions of the Competition Act cannot be overemphasized. As an example, consider some of the provincial agencies which supply electricity, which are explicit monopolies and practice an overt form of price discrimination but which are not under effective economic regulation at present. Canadians could derive much benefit were a wide variety of public bodies brought into view. If the government is sincere in its stated intent to bring about the most efficient functioning of the Canadian economy, it cannot fail to include crown corporations under the provisions of the act.

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30. Section 92(2) needs strengthening to ensure that professions and trades are truly regulated "in the public interest." Regulatory bodies are subject to the same pressure as previously outlined in this brief in respect to the Tribunal. Unless there are specific provisions to ensure that the public interest be the paramount concern of such bodies, CAC cannot accept their exemption from this act.

31. Finally, we urge the Minister to explicitly charge the Competitive Practices Tribunal with the duty to tie tariff reductions to every specialization agreement arranged. Otherwise there is serious danger that there will be no public benefit from any increase in efficiency brought about by the Tribunal's deliberations.

E. CONCLUSION

The Consumers' Association of Canada welcomes the proposed Competition Act and approves its underlying purpose, to regulate and improve competition in Canada and to create a more equitable marketplace. However, we have grave reservations about certain provisions which do not appear to follow the stated intent of the Minister of Consumer and Corporate Affairs. Our reservations include:

(1) the lack of full standing for individuals before the Tribunal, which we believe to be essential.

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(2) the lack of specific direction that members of the Tribunal be sympathetic to the consumer interest and for the inclusion of members who will directly represent the consumer.

(3) the exclusion of services from certain sections of the Bill relating to misleading advertising.

(4) the exclusion of crown corporations and regulated professions from the Act.

CAC urges that these exclusions be removed in redrafting the Act and the Provisions for the Tribunal be strengthened to make it more responsive in the public interest.

CAC regards the implementation of a strengthened Competition Act as a major step toward achieving maximum efficiency in the functioning of the Canadian economy and toward providing to consumers the maximum possible benefit of this increased efficiency.

APPENDIX I

TABLE I

Estimated Value to the Pharmaceutical Industry
of Imperfect Competition in the Canadian Market

Year	Net Profit on Sales - %		Sales of Pharmaceutical Industry in Millions of Canadian Dollars	Profits From Imperfect Competition in Millions of Canadian Dollars
	Pharmaceutical Industry	General Manufacturing		
1959[a]	6.2	5.1	164.7	1.8
1960[a]	5.5	4.4	164.9	1.8
1968[b]	6.5	4.0	374.3	9.4
1960-69[c]				24.9

a
Pharmaceutical Industry figures are for the 40 largest firms as reported in the Royal Commission on Health Services Provision, Distribution and Cost of Drugs in Canada (Hale Commission), pp. 25, 32.

b
Pharmaceutical Industry Figures are for all firms as reported in Corporation Financial Statistics, Statistics Canada.

c
Estimate is based on 1960 figure of $1.8 million, believed to be low because of coverage (see note a), and on a growth rate of 7% per year which also appears to be low from the 1968 figure given in the table. The monopolistic portion of net profits appears to be 20-40% of overall net profits in this industry. With a forward - instead of a backward-looking perspective, the time horizon necessary to yield the ten million dollar estimate given in the test is exceedingly short - somewhat less than five years, and perhaps as short as one year.

None of the figures cited indicate the loss to the economy from imperfect competition in this industry. Among other things the latter would have to include expenditures the industry makes as an investment in imperfect competition. As a report to Parliament concluded, this "...takes the form of concentration on the development of minor differences in products and of sales promotion.... Rivalry between the firms requires more detail men, more advertising and so on. The resulting higher costs are used to justify higher prices. The evidence submitted to the special committee of the house by the Canadian Pharmaceutical Manufacturers Association showed that virtually the same amount was spent by the industry on sales promotion as on manufacturing the product. There were 49 members of the association who employed 1799 detail men, and the association estimated there was one detail man for every ten physicians in Canada." (Hansard, February 12, 1968). The loss to the economy from resources misallocated in this way is not trivial: detailing expenses even in 1960 were at least 9.7 million dollars. (Hall Commission, Provision, Distribution, and Cost of Drugs in Canada, p.34).

Appendix I

Table 2

Drug Prices in Canadian Dollars for Fifteen Common Drugs, Canada and United Kingdom from Data from the Canadian Pharmaceutical Manufacturers Association

Product	Prices to Retailer		Price in Canada Relative to Price in United Kingdom
	United Kingdom	Canada	
Achromycin	2.31	3.24	140.3%
Chloromycetin	2.04	3.96	194.1
Terramycin	2.79	4.17	149.5
Penbritin	3.87	5.37	138.8
Gantrinin	2.40	4.14	172.5
Decadron	9.56	11.94	124.9
Librium	3.00	7.20	240.0
Equanil	.94	3.40	361.7
Stelazine	2.62	3.75	143.1
Ismelin	4.14	4.33	104.6
Hydrodiuril	4.43	3.12	70.4
Diuril	4.79	4.38	91.4
Peritrate	.77	2.50	324.7
Seconal	.90	2.85	316.6
Pribenzamin	.84	1.53	182.1
Total	45.40	65.88	2755.7

Price increase from unweighted totals: 45.1%
Average percentage increase in price: 83.7%

Source: Hansard, February 12, 1968

Appendix I

Table 3

Price to Retailer for Nine Common Drugs in Canada and the United Kingdom from Data collected by the Special Committee of the House of Commons

Trade Name	Price to Retailer ($ ¢)		Price in Canada Relative to Price in United Kingdom
	United Kingdom	Canada	
Chloromycetin	11.18	23.64	211.4%
Achromycin	9.83	17.62	179.2
Gantrisin	2.40	4.14	172.5
Decadron	14.11	17.44	123.6
Librium	3.02	7.20	238.4
Equanil	2.85	7.20	252.6
Enovid	7.70	11.70	151.9
Butazolidin	2.12	6.18	291.5
Premarin	5.78	6.36	110.0
Total	64.77	101.48	1731.3

Percentage increase from unweighted totals: 56.6
Average percentage differential: 92.4

Source: Hansard, February 12, 1968